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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. 41191

WEST TEXAS UTILITIES COMPANY
v.
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: March 19, 2004

On September 2, 2003, AEP Texas North Company filed a petition to vacate the current rate prescription governing unit-train movements of coal by The Burlington Northern and Santa Fe Railway Company (BNSF) from the Rawhide mine in the Powder River Basin (PRB) of Wyoming to the Oklaunion Generating Station, a coal-fired electricity generating plant in Vernon, TX. BNSF filed a reply in opposition on September 22, 2003. This decision grants the petition and vacates the rate prescription.

BACKGROUND

AEP Texas North Company is the successor in interest to West Texas Utilities Company (WTU), the original complainant in this proceeding. The original defendant in this proceeding, Burlington Northern Railroad Company (BN), has since merged with The Atchison, Topeka and Santa Fe Railway Company (ATSF) to form BNSF. For convenience and for consistency with recent decisions in this proceeding, both the original complainant and its successor are referred to as WTU, and both the original defendant and its predecessor are referred to as BNSF.

In a 1996 decision in this proceeding (West Texas I, 1 S.T.B. 638), the Board determined that the challenged rate exceeded the rate allowed under the stand-alone-cost (SAC) test and was thus unreasonable. Because the revenues that would be produced by the SAC rate at the outset of the 20-year SAC analysis period were less than 180% of BNSF's variable cost of providing the service — the floor under 49 U.S.C. 10707(d)(1)(A) for regulatory rate intervention — the Board prescribed the maximum rate at the 180% revenue-to-variable cost (R/VC) level. 1 S.T.B. at 677-78. Although WTU had, in the course of the proceeding, identified 10 additional PRB mine origins from which it sought a rate prescription, the prescription in West Texas I was limited to movements originating from the Rawhide mine because of deficiencies in WTU's presentation with respect to the other origins. The Board noted that it would address rate reasonableness concerns with respect to other mine origins if appropriate supplemental evidence were submitted. 1 S.T.B. at 644.

In 1997 the Rawhide mine closed, and WTU began to procure its coal from other PRB mines. BNSF voluntarily extended the unit-train rate it was charging WTU from the Rawhide mine to WTU unit-train movements from other PRB mines. In 2000, however, BNSF notified the Board that it intended to increase its rate to WTU for movements from non-Rawhide mines. BNSF asked the Board to confirm that the rate prescription in West Texas I applied only to coal movements from the Rawhide mine or, in the alternative, to modify the prescription to allow BNSF to charge the higher of the 180% R/VC rate level or the SAC rate, as by that time the SAC rate exceeded the regulatory floor. In a decision served on November 7, 2000, the Board ruled that BNSF did not need a Board order to be able to raise its rate from other origins, as the prescription applied only to movements from the Rawhide mine.

The Rawhide mine reopened in 2002, and WTU resumed shipments from Rawhide at that time. In a petition filed in April 2003, BNSF asked the Board to modify the Rawhide prescription so that it could charge the higher of the 180% of variable cost rate floor or the SAC rate. It argued that the Board had erred in West Texas I by not providing for it to be able to charge the SAC rate when that rate exceeded the 180% R/VC rate. The Board agreed and, in a decision served May 29, 2003 (West Texas II), revised the West Texas I prescription to allow BNSF to charge the higher of the SAC rate level or the 180% R/VC rate level.

The Board declined in West Texas II to consider WTU's assertion that the original SAC analysis was outdated. The Board explained that WTU would need to file a petition to reopen demonstrating changed circumstances sufficient to warrant reopening the case. In a decision served on July 23, 2003 (West Texas III), the Board clarified that such a reopening could not be used to change the fundamental assumptions upon which the original SAC analysis had been based. Rather, to alter the basic assumptions underlying an existing prescription and relitigate the reasonableness of a rate, the shipper would first have to have the rate prescription vacated and then challenge whatever new rate the carrier establishes.

Pursuant to West Texas II, BNSF has now raised the Rawhide rate to the SAC rate level, and it has chosen to apply the same increased rate to WTU movements from all other PRB mine origins. WTU has filed a complaint, in STB Docket No. 41191 (Sub-No. 1), challenging the reasonableness of the increased rate as applied to movements from the non-Rawhide PRB mine origins.

With respect to the outstanding rate prescription for WTU movements from the Rawhide mine, WTU, which has taken no coal from the Rawhide mine since the prescription was revised, has filed a petition for reconsideration of West Texas II. It argues that the initial rate prescription would have been different had current circumstances existed in 1996. For example, its SAC analysis would have included in the traffic group coal moving to six additional power plants that did not then receive PRB coal from BNSF, and its SAC analysis would have reflected efficiencies at two of the eleven power plants in its initial traffic group as a result of the merger of BN and ATSF.

As suggested in West Texas III, WTU has also filed an alternative petition to vacate the Rawhide prescription.

DISCUSSION AND CONCLUSIONS

As BNSF points out, the Board's West Texas III decision was silent as to the standard a shipper must meet in order to have a rate prescription vacated. BNSF notes that, regardless of which party seeks to reopen and modify an existing rate prescription, the party seeking such relief must make a sufficient threshold evidentiary showing of material error, new evidence, or changed circumstances to justify a reopening under 49 U.S.C. 722(c)(1). BNSF argues that the standard for vacating a rate prescription should be no less restrictive than the standard for reopening and modifying a rate prescription.

The Board does not agree. As the proponent and beneficiary of the rate prescription, the complaining shipper should be entitled to have that prescription vacated upon request, without having to show that the prescription is now defective. This policy is appropriate to ensure that a captive shipper who prevails on its rate complaint in the first instance does not later end up in a worse position — by having to bear a higher rate than would be justified under a new SAC analysis — than if it had not earlier challenged the rate or had been unsuccessful in its earlier challenge. This is a particular concern given the long period of time covered by a SAC analysis (usually looking forward 20 years) and any resulting rate prescription. The economic and regulatory conditions reflected in the SAC analysis can change significantly over that time period. The rate prescription, which was imposed to protect the captive shipper from unreasonably high rates, should not become the source of a rate that would now be considered unreasonable under a SAC analysis.

BNSF expresses concern that allowing the shipper to file a new rate complaint would subject the carrier to repetitive rate litigation over the same traffic. But nothing prevents an unsuccessful complainant from pursuing a new complaint immediately, and nothing binds that shipper to its prior evidentiary presentation. A successful complainant that is no longer satisfied with a rate prescription should have the same opportunity. Of course, the choice to have a rate prescription vacated is not one that a shipper would exercise lightly. The shipper must then relinquish the benefits of the prior rate prescription and pay the increased rate the carrier establishes once its ratemaking initiative is restored, and the shipper bears the risk that a new rate complaint may not be as successful.

BNSF points out that a carrier seeking to vacate a rate prescription must meet a threshold evidentiary burden, citing San Antonio, TX v. Burlington Northern, Inc., 364 I.C.C. 887 (1981), and it argues that the same should hold true for a shipper. But disparate treatment of a regulated carrier and a complaining shipper does not constitute a double standard, as the two parties are not similarly situated. The immediate consequence of a prescription being vacated is renewed ratemaking freedom for the carrier and a substantial burden on the shipper to establish that any

newly established rate is unreasonable. Thus, it is not unfair for a stricter rule to apply to a regulated carrier seeking to vacate a prescription than to a shipper who would bear the burden of showing that the new rate is unreasonable.

Finally, BNSF argues that it would be unfair to vacate the prescription in this particular case because, under the SAC procedures used in West Texas I, WTU received a lower initial rate prescription than it would receive under current SAC procedures. However, most of the financial consequences associated with the initial prescription could have been avoided by BNSF. As noted above, the Rawhide mine was closed from 1997 to 2002; upon its reopening, WTU shipped coal until the higher (SAC) rate was imposed. Thus, for most of the time since 1997, BNSF voluntarily applied the West Texas I prescription to the other mines. It charged even less than the SAC rate, even though it recognized (as evidenced in its 2000 petition for clarification) that the SAC rate was higher and that more recent Board prescriptions routinely allowed a defendant railroad to charge the higher of the SAC rate or the 180% R/VC rate level.

Accordingly, the rate prescription governing movements from the Rawhide mine will be vacated. This action moots the petition for reconsideration of West Texas II, and that petition will be dismissed.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The rate prescription imposed in West Texas I, as modified in West Texas II, is vacated and shall have no further force and effect.

2. The petition for reconsideration of the Board's decision is West Texas II is dismissed.

3. This decision is effective on April 18, 2004.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary